IN THE
INDIANA SUPREME COURT

NO. _____

IRA C. RITTER and THE KROGER CO., Appellants (Defendants below), v. JERRY STANTON and RUTH A. STANTON, Appellees (Plaintiffs below).	Indiana Court of Appeals No. 49A02-9912-CV-00883 Appeal from the Marion Superior Court, No. 10 Cause No. 49D10-9506-CT-0959 The Honorable Richard H. Huston, Judge

APPELLANTS' REPLY TO BRIEF OPPOSING TRANSFER

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I. ARGUMENT

A. $67 MILLION FOR GENERAL DAMAGES IS EXCESSIVE

$67 million for general damages. Plaintiffs never mention this amount in their Brief in Opposition to Transfer, perhaps fearful this Court would indeed blush at its enormity. By any measure, this award is excessive and must be reduced.

1. This Award Fails The "First Blush" Test

Kroger does not seek to overturn the "first blush" test; it simply asks that the test be applied. An award is excessive under this test if it "appear[s] to be so outrageous as to impress the Court at 'first blush' with its enormity." *Kimberlin v. DeLong*, 637 N.E.2d 121, 129 (Ind. 1994), *cert. denied*, 516 U.S. 829 (1995).

Review of a **non-pecuniary** award, such as this one, is a two-step process: First, whether any award at all is justified, and second, by applying the "first blush" test, whether the amount awarded is within the bounds of reason. *See Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977) (evidence supported award of punitive damages, but amount awarded violated "first blush" rule). Limiting the inquiry to the first step, as Plaintiffs urge, is only appropriate when reviewing a **pecuniary** damage award[1] and where there are objective criteria to evaluate (the "within the scope of the evidence" test). However, when reviewing a **non-pecuniary** loss, the "first blush" test is used because the amount of non-pecuniary loss is not capable of objective ascertainment. Otherwise, there would be no need for the "first blush" test.

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[1] *Sears Roebuck & Co. v. Manuilov*, 742 N.E.2d 453 (Ind. 2001), and *State v. Daley*, 153 Ind.App. 330, 287 N.E.2d 552 (1972), cited by Plaintiffs, both involved pecuniary damage awards and are thus inapposite. The issue of excessive non-pecuniary damages was not presented.

Kroger agrees that the Stantons' injuries justify a substantial award of general damages. However, this award, on "first blush", exceeds the bounds of reason. Pursuant to its authority under IND. APPELLATE RULE 15(N),[2] this Court should order a new trial or a new trial subject to remittitur.[3]

2. The Court Of Appeals Was Obligated To Engage In A Meaningful Review

Plaintiffs argue that Indiana appellate courts have no authority to disturb a jury award of damages, and that a jury's discretion in assessing damages is limitless. The Court of Appeals agreed. This is **not** Indiana law.

First, APP.R. 15(N) provides the authority to reduce excessive verdicts, and has the full force of law. *See* IND. CODE § 34-8-2-2 (general assembly incorporates into the Indiana Code Supreme Court rules). No case has held this Rule unconstitutional.[4]

Second, as Plaintiffs recognize, appellate review of excessive verdicts has been a longstanding part of Indiana jurisprudence. *See*, e.g., *Louisville & N. R. Co. v. Kemper*, 153 Ind. 618, 53 N.E. 931 (1899) (common law "first blush" test); *State v. Church of Nazarene of Logansport*, 268 Ind. 523, 377 N.E.2d 607, 610 (1978) (authority under the appellate rules).

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[2] Now RULE 66.

[3] The use of remittitur to set aside verdicts that are "clearly disproportionate to community expectations" is a recommended method of controlling unrealistic awards. American Bar Assoc., *Report of the Action Commission to Improve the Tort Liability System*, 13 (1987). Using remittitur to control "runaway" jury awards is not the same as imposing a cap on pain and suffering damages, as Plaintiffs imply, and Kroger does not request such a cap. Kroger simply asks that the process provided by Indiana law to review excessive verdicts be applied to this case.

[4] Contrary to Plaintiffs' assertion, *Carbone v. Schwarte*, 629 N.E.2d 1259 (Ind.Ct.App. 1994), does **not** hold that IND. CONST. art 1 § 20 constrains appellate review of a verdict challenged as excessive. *Carbone* merely restates settled law that an appellate court does not reweigh evidence. *Id.* at 1261.

Third, the right to a civil jury trial does not equate to a jury's right to award any amount of damages. Although the jury's discretion in determining damages is broad, it "is not limitless." *Dollar Inn, Inc. v. Slone,* 695 N.E.2d 185, 190 (Ind.Ct.App. 1998), *transfer denied*; *see also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 116 S.Ct. 2211, 2222 (1996) (the "fair administration of justice" must be balanced against the right to jury trial; jury discretion must have an "upper limit").

The Court of Appeals had the "duty to insure that the jury acted properly in assessing damages." *Groves v. First Nat'l Bank of Valparaiso*, 518 N.E.2d 819, 831 (Ind.Ct.App. 1988), *transfer denied.* Kroger was entitled to meaningful review of the award, and the Court's conclusion that it could not do so was erroneous.

3. Considering Verdicts In Comparable Cases Is An Accepted Tool Of Judicial Review

Kroger is not espousing a radical departure from accepted jurisprudence. In evaluating an award for excessiveness, particularly where, as here, the vast majority is for non-pecuniary damages, many jurisdictions, including Indiana, have compared the award in question to awards in factually similar cases. *See*, e.g., *Groves*, 518 N.E.2d 819; *Miksis v. Howard*, 106 F.3d 754 (7th Cir. 1997); *Sanders v. City of Indianapolis*, 837 F.Supp. 959, 966 (S.D.Ind. 1992). A "comparability analysis" can provide an objective frame of reference. *Wheat v. United States*, 860 F.2d 1256, 1259 (5th Cir. 1988). Indiana's "first blush" test, by its very nature, invites a comparison to other verdicts.

The general damages awarded the Stantons are nearly nine (9) times the highest amount awarded during the last five years **nationwide** to a husband and wife for injuries received in a vehicular accident. Moreover, the award is more than nine (9) times the highest Indiana verdict. Although the nature of the injuries justifies a large damage award, any award of compensatory

damages must be reasonable. An award of $67 million in general damages is simply not reasonable. The general damage award is excessive and must be remitted or a new trial granted.

B. CONSTITUTIONAL AND WORKER'S COMPENSATION ISSUES

Kroger stands on all other arguments raised in its Transfer Petition.

II. CONCLUSION

Kroger requests that this Court grant transfer.

Respectfully submitted,

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